

1960

c 433 Wills Act

Ontario

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CHAPTER 433

The Wills Act

1. In this Act,

Interpre-
tation

- (a) "land" includes messuages, and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be paid out in the purchase of land, and any share of the same hereditaments and properties, or any of them, and any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency;
- (b) "mortgage" includes any lien for unpaid purchase money, and any charge, encumbrance, or obligation of any nature whatever upon any land or tenements of a testator or intestate, and "mortgagee" has a meaning corresponding with that of mortgage;
- (c) "personal estate" includes leasehold estates and other chattels real, and also money, shares of government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property, except real estate, which by law devolves upon the executor or administrator, and any share or interest therein;
- (d) "real estate" includes messuages, land, rents and hereditaments, whether freehold or of any other tenure, and whether corporeal, incorporeal or personal, and any undivided share thereof, and any estate, right, or interest (other than a chattel interest) therein;
- (e) "will" includes a testament, and a codicil, and an appointment by will, or by writing in the nature of a will in exercise of a power, and also a disposition by will and testament, or devise of the custody and tuition of any child, by virtue of *The Infants Act*, and any other testamentary disposition. R.S.O. 1950, c. 426, s. 1.

R.S.O. 1960,
c. 187

WILLS BEFORE 1ST JANUARY, 1874

When real estate subsequently acquired may pass by the will

2. Where a will made before, and not re-executed, republished or revived after the 1st day of January, 1874, by any person dying after the 6th day of March, 1834, contains a devise in any form of words of all such real estate as the testator dies seised or possessed of, or of any part or proportion thereof, such will is valid and effectual to pass any land acquired by the devisor, after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof. R.S.O. 1950, c. 426, s. 2.

What estate deemed to pass by devise

3. Where land is devised in any such will it shall be considered that the devisor intended to devise all such estate as he was seised of in the same land, whether in fee simple or otherwise, unless it appears upon the face of such will that he intended to devise only an estate for life, or other estate less than he was seised of at the time of making the will containing such devise. R.S.O. 1950, c. 426, s. 3.

Witness need not subscribe in the presence of the testator

4. Any will affecting land executed after the 6th day of March, 1834, and before the 1st day of January, 1874, in the presence of and attested by two or more witnesses has the same validity and effect as if executed in the presence of and attested by three witnesses; and it is sufficient if the witnesses subscribed their names in the presence of each other, although their names were not subscribed in the presence of the testator. R.S.O. 1950, c. 426, s. 4.

Will by married woman between 4th May, 1859, and 1st January, 1874

5. After the 4th day of May, 1859, and before the 1st day of January, 1874, every married woman might, by devise or bequest executed in the presence of two or more witnesses, neither of whom was her husband, make any devise or bequest of her separate property, real or personal, or of any rights therein, whether such property was acquired before or after marriage, to or among her child or children issue of any marriage, and failing there being any issue, then to her husband, or as she might see fit, in the same manner as if she were sole and unmarried. R.S.O. 1950, c. 426, s. 5.

WILLS AFTER 1ST JANUARY, 1874

Operation of subsequent sections

6. Unless herein otherwise expressly provided, the subsequent sections of this Act do not extend to any will made before the 1st day of January, 1874; but every will re-executed or republished, or revived by any codicil, shall for the purposes of those sections, be deemed to have been made at the time at which the will was so re-executed, republished or revived. R.S.O. 1950, c. 426, s. 6.

7. Sections 21, 22, 25 and 26 do not apply to the will of any person who died before the 1st day of January, 1869, but do apply to the will of every person who died since the 31st day of December, 1868. R.S.O. 1950, c. 426, s. 7.

Application
of sections
21, 22, 25
and 26

8. Subject to *The Devolution of Estates Act* and *The Accumulations Act*, every person may devise, bequeath, or dispose of by will, executed in manner hereinafter mentioned, all real estate and personal estate to which he may be entitled, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon his heirs or upon his executor or administrator, and the power hereby given extends to estates *pur autre vie*, whether there is or is not any special occupant thereof, and whether the same are corporeal or incorporeal hereditaments, and also to all contingent, executory, or other future interests in any real estate or personal estate, whether the testator is or is not ascertained as the person, or one of the persons, in whom the same may become vested, and whether he is entitled thereto under the instrument by which the same were created, or under any disposition thereof by deed or will, and also to all rights of entry for conditions broken and other rights of entry, and also to such of the same estates, interests and rights respectively, and other real estate and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will. R.S.O. 1950, c. 426, s. 8.

Power to
dispose of all
property
R.S.O. 1960,
cc. 106, 4

9. A widow may, in like manner, bequeath the crop of her ground as well as of her dower as of other her real estate. R.S.O. 1950, c. 426, s. 9.

Widow's
right to
dispose of
crop

10. Save as provided by section 13, no will made by any person under the age of twenty-one years is valid. R.S.O. 1950, c. 426, s. 10.

Wills by
infants
invalid

11.—(1) No will is valid unless it is in writing and executed in the manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; but no form of attestation is necessary.

Execution

(2) Every will, so far only as regards the position of the signature of the testator, or of the person so signing for him, is valid within the meaning of this Act if the signature is so

Position of
signature

placed, at, or after, or following or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will, and no such will is affected by the circumstance that the signature does not follow or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or by the circumstance that the signature is placed among the words of the *testimonium* clause, or of the clause of attestation, or follows or is after or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature is on a side, or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will is written above the signature, or by the circumstance that there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature, and the enumeration of the above circumstances does not restrict the generality of the above enactment; but no signature is operative to give effect to any disposition, or direction which is underneath, or which follows it, nor does it give effect to any disposition or direction inserted after the signature was made. R.S.O. 1950, c. 426, s. 11.

Exercise of
appoint-
ments by
will

12. No appointment made by will in exercise of any power is valid unless the appointment is executed in the manner hereinbefore required, and every will executed in the manner hereinbefore required is, so far as respects the execution and attestation thereof, a valid execution of a power of appointment by will, notwithstanding it has been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity. R.S.O. 1950, c. 426, s. 12.

Will of
member of
the forces

13.—(1) The will of any member of the forces, or of any mariner or seaman when at sea or in course of a voyage, disposing of real or personal property, or both, may be made by a writing signed by him without any further formality or any requirement as to the presence of or attestation or signature by any witness.

Age of
testator

(2) The fact that the member of the forces or the mariner or seaman is under the age of twenty-one years at the time he makes his will does not invalidate it.

Interpre-
tation

(3) In this section, "member of the forces" means a member of the naval, military or air forces of Canada who, having

been placed on active service or called out for training, service or duty, is serving in any of such forces. R.S.O. 1950, c. 426, s. 13.

14. Every will executed in manner hereinbefore required is valid without any other publication thereof. R.S.O. 1950, c. 426, s. 14. Publication unnecessary

15. If any person who attests the execution of a will is, at the time of the execution thereof, or becomes at any time afterwards, incompetent to be admitted as a witness to prove the execution thereof, such will is not on that account invalid. R.S.O. 1950, c. 426, s. 15. Effect of incompetency of witness

16. If any person attests the execution of any will to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real estate or personal estate, other than and except charges and directions for the payment of any debt, is thereby given or made, such devise, legacy, estate, interest, gift, or appointment is, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or such wife or husband, utterly null and void, and the person so attesting shall be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will. R.S.O. 1950, c. 426, s. 16. Gifts, etc., to witness invalid

17. In case, by any will, any real estate or personal estate is charged with any debt, and any creditor, or the wife or husband of any creditor, whose debt is so charged attests the execution of such will, the creditor, notwithstanding such charge, shall be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof. R.S.O. 1950, c. 426, s. 17. Creditor as witness

18. No person shall, on account of his being an executor of a will, be incompetent to be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof. R.S.O. 1950, c. 426, s. 18. Executor as witness

19.—(1) In this section,

- (a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;

Conflict of laws, interpretation

- (b) an interest in movables includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land.

Interests in land

(2) Subject to the other provisions of this section, the manner and formalities of making, and the intrinsic validity and effect of a will, so far as the will relates to an interest in land, are governed by the law of the place where the land is situated.

Interests in movables

(3) Subject to the other provisions of this section, the manner and formalities of making, and the intrinsic validity and effect of a will, so far as the will relates to an interest in movables, are governed by the law of the place where the testator was domiciled at the time of his death.

Idem

(4) As regards the manner and formalities of making a will, so far as it relates to an interest in movables, a will made either in or out of Ontario is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where,

- (a) the will was made; or
- (b) the testator was domiciled when the will was made; or
- (c) the testator had his domicile of origin.

Change of domicile

(5) A change of domicile of the testator occurring after a will is made does not render the will invalid as regards the manner and formalities of its making or alter its construction.

Construction of will

(6) Nothing in this section precludes resort to the law of the place where the testator was domiciled at the time of making a will in aid of its construction as regards an interest in land or an interest in movables.

Movables used in relation to land

(7) When the value of a thing that is movable consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land, succession to an interest in the thing, either under a will or an intestacy, is governed by the law of the place where the land is situated.

Application of section

(8) This section applies only to wills made on or after the 1st day of July, 1954.

Application of R.S.O. 1950, c. 426, s. 19

(9) Section 19 of *The Wills Act* as it appears in the Revised Statutes of Ontario, 1950 applies to wills made before the 1st day of July, 1954.

Re-executed wills

(10) For the purposes of this section, a will that is re-executed or that is revived by codicil shall be deemed to be made at the time at which it is so re-executed or revived. 1954, c. 105, s. 1.

20. Every will made by any person dying on or after the 13th day of April, 1897, is revoked by the marriage of the testator, except, Revocation by marriage

- (a) where it is declared in the will that the same is made in contemplation of such marriage;
- (b) where the wife or husband of the testator elects to take under the will, by an instrument in writing signed by the wife or husband and filed within one year after the testator's death in the office of the Registrar of the Supreme Court;
- (c) where the will is made in the exercise of a power of appointment and the real estate or personal estate thereby appointed would not in default of such appointment pass to the testator's heirs, executor or administrator, or the person entitled as the testator's next of kin under *The Devolution of Estates Act*. R.S.O. 1950, c. 426, s. 20. R.S.O. 1960, c. 106

21. No will is revoked by any presumption of an intention on the ground of an alteration in circumstances. Change in circumstances R.S.O. 1950, c. 426, s. 21.

22. No will, or any part thereof, is revoked otherwise than as aforesaid provided by section 20, or by another will executed in the manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction with the intention of revoking the same. Revocation R.S.O. 1950, c. 426, s. 22.

23. No obliteration, interlineation or other alteration made in any will after the execution thereof is valid or has any effect, except so far as the words or effect of the will before such alteration are not apparent, unless such alteration is executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses are made in the margin or in some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or in some other part of the will. Obliterations, interlineations, etc. R.S.O. 1950, c. 426, s. 23.

24. No will, or any part thereof, that has been in any manner revoked, is revived otherwise than by the re-execution Revival

thereof, or by a codicil executed in the manner hereinbefore required, and showing an intention to revive the same, and where any will that has been partly revoked, and afterwards wholly revoked, is revived such revival does not extend to so much thereof as was revoked before the revocation of the whole thereof, unless an intention to the contrary is shown. R.S.O. 1950, c. 426, s. 24.

Operation of
the will as to
any interest
left in
testator

25. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real estate or personal estate therein comprised, except an act by which such will is revoked as aforesaid, prevents the operation of the will with respect to such estate, or interest in such real estate or personal estate, as the testator had power to dispose of by will at the time of his death. R.S.O. 1950, c. 426, s. 25.

Will to speak
from death

26.—(1) Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

Application
of section

(2) This section applies to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and any such will need not be re-executed or republished after the death of her husband. R.S.O. 1950, c. 426, s. 26.

Disposition
of lapsed
devise

27. Unless a contrary intention appears by the will such real estate as is comprised or intended to be comprised in any devise in such will that fails or becomes void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will. R.S.O. 1950, c. 426, s. 27.

Disposition
of leaseholds
under a
general
devise of
real estate

28. A devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise that would describe a leasehold estate, if the testator had no freehold estate that could be described by it, shall be construed to include his leasehold estates, or any of them, to which such description will extend as well as freehold estates, unless a contrary intention appears by the will. R.S.O. 1950, c. 426, s. 28.

29. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description will extend, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal estate described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description will extend, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will. R.S.O. 1950, c. 426, s. 29.

Disposition of property over which testator has a general power of appointment under general devise or bequest

30. Where any real estate is devised to any person without any words of limitation, such devise shall, subject to *The Devolution of Estates Act*, be construed to pass the fee simple or other the whole estate or interest that the testator had power to dispose of by will, unless a contrary intention appears by the will. R.S.O. 1950, c. 426, s. 30.

Estate passing under devise without words of limitation
R.S.O. 1960, c. 106

31. Where any real estate is devised by any testator, dying on or after the 5th day of March, 1880, to the heir or heirs of such testator, or of any other person, and no contrary or other intention is signified by the will, the words "heir" or "heirs" shall be construed to mean the person or persons to whom the real estate of the testator, or of such other person as the case may be, would descend under the law of Ontario in case of an intestacy. R.S.O. 1950, c. 426, s. 31.

Meaning of "heir" in a devise of real estate

32. In any devise or bequest of real estate or personal estate, the words "die without issue", or "die without leaving issue", or "have no issue", or any other words that import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention appears by the will by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; but this Act does not extend to cases where such words import if no issue described in a preceding gift be born, or if there be no issue who live to attain the age or otherwise answer the description required

Import of words "die without issue", or to that effect

for obtaining a vested estate by a preceding gift to such issue. R.S.O. 1950, c. 426, s. 32.

Estate passing under devise to trustee or executor

33. Where any real estate is devised to a trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest that the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold is thereby given to him expressly or by implication. R.S.O. 1950, c. 426, s. 33.

When devise to a trustee shall pass the whole estate beyond what is requisite for the trust

R.S.O. 1960, c. 106

34. Where any real estate is devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, is not given to any person for life, or such beneficial interest is given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall, subject to *The Devolution of Estates Act*, be construed to vest in such trustee the fee simple or other the whole legal estate that the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust are satisfied. R.S.O. 1950, c. 426, s. 34.

When devise in tail not to lapse

35. Where any person to whom any real estate is devised for an estate tail, or an estate in *quasi* entail, dies in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue are living at the time of the death of the testator, such devise does not lapse but takes effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will. R.S.O. 1950, c. 426, s. 35.

Substitutional gifts

36. Unless a contrary intention^{*} appears by the will, where a devise or bequest is made to a child, grandchild, brother or sister of the testator who dies before the testator and leaves issue surviving the testator, the devise or bequest does not lapse but takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible if he had died intestate and without debts immediately after the death of the testator. 1959, c. 108, s. 1.

Primary liability of real estate to satisfy specific charge

37.—(1) Where any person has died since the 31st day of December, 1865, or hereafter dies, seised of or entitled to any estate or interest in any real estate, which, at the time of his death, was or is charged with the payment of any sum of money by way of mortgage, and such person has not by his will or deed or other document, signified any contrary or other

intention, the heir or devisee to whom such real estate descends or is devised is not entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the real estate so charged is, as between the different persons claiming through or under the deceased person, primarily liable to the payment of all mortgage debts with which the same is charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof.

(2) In the construction of a will to which this section relates, a general direction that the debts, or that all the debts, of the testator shall be paid out of his personal estate, or a charge or direction for the payment of debts upon or out of residuary real estate and personal estate or residuary real estate shall not be deemed to be a declaration of an intention contrary to or other than the rule in subsection 1, unless such contrary or other intention is further declared by words expressly or by necessary implication referring to all or some of the testator's debts charged by way of mortgage on any part of his real estate.

Consequence
of general
direction for
payment of
debts out of
personalty
or residue

(3) Nothing herein affects or diminishes any right of the mortgagee to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying or otherwise, and nothing herein affects the rights of any person claiming under any will, deed or document made before the 1st day of January, 1874. R.S.O. 1950, c. 426, s. 37.

Saving of
mortgagee's
rights

